Supreme Court, U. S.
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79-842

IN THE

Supreme Court of the United States

October Term, 1979.

No.

RIVERSIDE MEMORIAL MAUSOLEUM, INC. T/A
DELAWARE VALLEY MEMORIAL CENTER;
L. BLUMBERG'S SON, INC. and
HELEN ROTHCHILD BLUMBERG,

Petitioner,

v.

SONNENBLICK-GOLDMAN CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ARNOLD LEVIN,
MICHAEL FISHBEIN,
JOSEPHINE B. STAMM,
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RIVERSIDE MEMORIAL MAUSOLEUM, INC. T/A DELAWARE VALLEY MEMORIAL CENTER; L. BLUMBERG'S SON, INC. and HELEN ROTHCHILD BLUMBERG,

Petitioner,

v.

SONNENBLICK-GOLDMAN CORPORATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, RIVERSIDE MEMORIAL MAUSOLEUM, T/A DELAWARE VALLEY MEMORIAL CENTER; L. BLUMBERG'S SON, INC. and HELEN ROTHCHILD BLUMBERG, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on August 31, 1979.

OPINIONS OF THE COURT BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania and Order of that Court is printed in Appendix C hereto. The Judgment Order of the United States Court of Appeals for the Third Circuit is printed in Appendix B hereto and is not reported. The order denying petitioners' motion for rehearing is printed in Appendix A.

JURISDICTION.

The Order of the United States Court of Appeals for the Third Circuit denying petitioners' motion for rehearing was entered on August 31, 1979. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Was it error for the district court to enter an order prohibiting petitioners from introducing evidence concerning matters inquired into by defendant-respondent's interrogatories pursuant to F. R. C. P. 37 and on that basis granting summary judgment, where petitioners were ten days late in filing such answers pursuant to F. R. C. P. 33, where there was no outstanding court order compelling such answers, where there was no evidence of petitioners' bad faith, and where there were lesser sanctions available which would have preserved the interest of the court in administering its docket while ensuring petitioners their right to their day in court.

STATEMENT OF THE CASE.

The instant action was originally brought by the individual petitioner in her own behalf and on behalf of two corporations of which she is president and sole shareholder, against UMET Trust and Sonnenblick-Goldman Corporation based upon allegations of commercial fraud, and seeking compensatory and punitive damages. The case has been before the Third Circuit Court of Appeals on two occasions previous to the instant judgment order which is appealed herefrom. In both instances, the District Court had entered summary judgment in favor of the defendants, and the Circuit Court vacated the judgments. The Court of Appeals ultimately ordered that the action be dismissed against UMET Trust for failure of diversity jurisdiction, but remanded the case as to Sonnenblick-Goldman Corporation for pretrial proceedings.

The factual basis for the instant action is as follows: On July 25, 1973 petitioners borrowed Three Million Nine Hundred Twenty-two Thousand Dollars ($3,922,000.00) from UMET Trust to construct a mausoleum building. Respondent Sonnenblick-Goldman was the mortgage broker who arranged for the loan, and was paid a fee for its services. The loan agreement provided that if, within six months, plaintiff evidenced "bona fide sales contracts" for 5,000 crypts, UMET Trust would lend an additional Three Million One Hundred Seventy-eight Thousand Dollars ($3,178,000.00), the total loan thus equalling Seven Million One Hundred Thousand Dollars ($7,100,000.00). The loan was in part secured by a mortgage on plaintiffs property. Petitioners did not sell the required number of crypts, and hence did not receive the additional sums under the loan, and UMET sought to foreclose on the mortgage. A complex history of state court proceedings between the parties ensued. Petitioners then filed the

instant action on April 25, 1975, alleging that UMET Trust and Sonnenblick-Goldman Corporation conspired to prevent the sale of crypts so that they could obtain the property at sheriff's sale and sell to persons previously contacted by the plaintiffs.

Because of the extensive appellate consideration of this case, pretrial discovery had not been commenced prior to the second remand order of the Court of Appeals.[1] On July 21, 1978, three years after the filing of the complaint, respondent filed its answer to petitioner's complaint. On July 14, 1978, the court set a discovery deadline of September 5, 1975, scarcely one and one-half months long. On July 21, 1978, respondent filed its first set of interrogatories addressed to petitioners. Pursuant to F. R. C. P. 33, answers were due on August 21, 1978. Petitioner's counsel failed to answer the same, and additionally failed to file interrogatories in petitioner's behalf. As a result, petitioners sought new counsel. On August 22, 1978, the firm of Adler, Barish, Daniels, Levin and Creskoff filed their appearance on petitioner's behalf and immediately began an intensive review of the file in order to answer outstanding discovery requests and to commence discovery on petitioners' behalf. On August 24, 1978, petitioners' former counsel withdrew his appearance.

Respondent immediately filed a motion for sanctions.[2] Eight days after entering their appearance, petitioners' new counsel answered the motion for sanctions and moved the court to extend the discovery period, alleging that a one and one-half month discovery deadline was inadequate to develop the complex factual issues involved in this case. On September 1, 1978, only one day after defendant had

1. 581 F. 2d 62 (3rd Cir. 1978).

2. The Motion for Sanctions was hand delivered to Petitioner's new counsel on August 24, 1978, and docketed with the court on August 31, 1978.

docketed its motion for sanctions, ten days after the interrogatories were due and four days before the expiration of its established discovery deadline, the Court entered an order prohibiting plaintiff from introducing evidence in this case concerning matters inquired into by defendant's interrogatories. Petitioners' counsel did not receive notice of the entry of this order until September 8, 1978. Having thus been unaware of the Court's September 1, 1978 order, counsel filed Answers to Sonnenblick-Goldman's First Set of Interrogatories on September 8, 1978.[3] On September 13, 1978, Plaintiff filed a Motion for Reconsideration of the Court's September 1, 1978 Order, and within one hour of the receipt of this motion, the Court by phone indicated that it would deny the requested relief. Subsequently, on September 18, 1978, defendant filed a motion for summary judgment based upon the court's September 1, 1978 Order, alleging that since plaintiffs were prohibited from introducing evidence as to the factual basis of their claim, there was no issue as to any material fact and that therefore summary judgment was appropriate. On October 17, 1978 the Court below filed a Memorandum and Order striking plaintiff's answers to interrogatories and granting defendant's motion for summary judgment. In its opinion, the court attempted to justify the imposition of the drastic sanction it imposed by referring to 1975 conduct on the part of petitioners' former attorney. The sequence of events reiterated by the Court is simply that:

> "On August 21, 1975, on our motion we directed plaintiffs to file a brief within 15 days on the question of jurisdiction. The order also required defendants to file a brief within 10 days following receipt of plaintiff's brief. On November 3, 1975 we extended

3. On September 6, 1978, the court denied Plaintiff's Motion to Extend Discovery.

> the time for filing the plaintiff's brief until November 25, 1975. No brief was filed. On December 10, 1975, we entered an order 'that the action be and it is hereby dismissed for failure of prosecution'."

At that time the Court did not specifically admonish plaintiff's counsel prior to the entry of dismissal that this sanction might be entered; petitioners were never so informed by the court; and it was not established that petitioners themselves were even aware of this missed deadline. Petitioners were never informed by the court prior to dismissal that their counsel had been delinquent and that they had an opportunity and/or right to obtain new counsel. Subsequently, the court must have felt some hesitation about the severity of the sanction, and on February 10, 1975, it refashioned its order and entered summary judgment in favor of the defendant on the basis of res judicata rather than dismissing the action for lack of prosecution. This 1975 conduct which the Judge found so compelling was not even raised by the Respondent in its motion for sanctions. Nonetheless, the court ultimately concluded that the 1975 conduct, coupled with the failure of petitioner to answer the interrogatories within the period of time prescribed by F. R. C. P. 33, warranted its granting of the motion for sanctions within ten days after the interrogatory answers were due, despite the fact that there was no outstanding court order compelling same.

REASONS FOR GRANTING THE WRIT.

The preclusionary order of the District Court and its subsequent granting of Defendant's motion for summary judgment constituted a violation of plaintiff's constitutional due process rights and an abuse of the trial court's discretion.

This case does *not* involve petitioner's failure to respond to a court order compelling discovery. There was never such an order entered. Rather, ten days after interrogatories were due under F. R. C. P. 33, the court entered a preclusionary order which in effect denied petitioner's the right to prove their case. Summary Judgment was then entered as a matter of form. The court's action was so outrageous and so inconsistent with the purposes of F. R. C. P. 37 as to violate petitioner's constitutional right of due process and to represent a gross abuse of the court's discretion.

The District Court relied upon two sub-divisions of F. R. C. P. 37 in entering the instant sanction.[4] This court

4. 37(d) provides: (d) *Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable

has had specific occasion to explore the constitutional limitations placed upon the application of F. R. C. P. 37, prior to the Rules Amendment in 1970, in *Societe Internationale v. Rogers,* 357 U. S. 197 (1958).[5] In that case the District Court had dismissed with prejudice Plaintiff's complaint pursuant to 37(b)(2) for failure to comply with a specific court order requiring plaintiffs to make available a large number of banking records. In addressing the scope of rule 37 sanctions it was observed:

> "The provisions of Rule 37 which are herein involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in Hovey v. Elliott, 167 U. S. 409, 43 L. Ed. 215, 17 S. Ct. 841, and Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. Ed. 530, 29 S. Ct. 370, 15 ANN. CAS. 645. These decisions established that there are Constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations.
> 357 U. S. at 209.

4. (Cont'd.)
unless the party failing to act has applied for a protective order as provided by Rule 26(c).

37(b)(2)(B), referred to in Section 37(d), provides in relevant part: (2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

5. This opinion is cited and followed by the Committee in the Notes of the Advisory Committee on Rules, appended to rule 37 as amended March 30, 1970.

The Court there determined that the application of the drastic sanction of dismissal was erroneous where plaintiff's failure was not as a result of willfullness or bad faith. The language of that case was cited with approval in *National Hockey League v. Metro-Hockey Club,* 427 U. S. 639 (1976), where the court upheld the application of an F. R. C. P. 37(b)(2) sanction dismissing a private antitrust action where plaintiffs failed to answer interrogatories during a seventeen month period, notwithstanding specific court orders to compel the same and several admonitions by the court that plaintiffs faced the possibility of dismissal. Such extensions and admonitions are distinctly and strikingly absent in the instant case.

Further, the Third Circuit per curiam order herein stands in conflict with the second circuit's opinion in *Flaks v. Koegel,* 504 F. 2d 702 (2nd Cir. 1974). That court specifically held that the severe sanctions which terminate a cause of action can only be applied where it is demonstrated that the party's failure was willful.

> "We conclude that the challenged order below [ordering striking of defendant's answer and entering judgment] is only sustainable if it has been demonstrated that the defendants' failure to comply was in fact due to willfullness, bad faith, or fault and not to an inability to comply. *Societe Internationale v. Rogers,* supra, 357 U. S. at 212. . . ." Id. at page 709.

The court specifically observed that the constitutional restraints upon the powers of courts to evoke harsh remedies under Rule 37 required that the affected party be given the opportunity for a hearing to determine in fact the existence of willfullness and/or bad faith.

Additional circuit court opinions have followed this reasoning and limited the application of sanctions terminating a cause of action to situations where willfulness or bad faith is manifest and where a lesser sanction is unavailable. *Kropp v. Ziebarth,* 557 F. 2d 142, 146 (8th Cir., 1977); *Thomas v. United States,* 531 F. 2d 746 (5th Cir., 1976); *Vac Air, Inc. v. John Mohr and Sons, Inc.,* 471 F. 2d 231, 234 (7th Cir., 1973).

The instant case must be viewed under the directive of due process considerations. No order of the Court was outstanding relative to petitioners' answers to interrogatories prior to the entry of the court's preclusionary order. The interrogatories themselves were extremely comprehensive. Answers in fact were tendered within eighteen days of the day they were due by counsel newly obtained by plaintiff, and stricken by the court nine days later. At the time of its September 1 order, the court was aware that plaintiff had obtained new counsel on August 22, 1978 and that counsel was intently attempting to familiarize itself with the case and to comply with all discovery request. While this fact does not render plaintiff immune from time limitations under F. R. C. P. 33, it must bear on the choice of the appropriate sanctions. It is clear that the sanction imposed was strictly punitive and in fact interfered with the very discovery process it purported to preserve. While it may be true that this case was the oldest on the calendar of the district judge by virtue of its appellate history, plaintiff should not have been prejudiced by inadequate pretrial discovery and the punitive sanction herein imposed, merely to cleanse that calendar.

Finally, it must be noted that both the 1975 conduct upon which the judge relied in part in granting the sanction herein imposed, as well as plaintiff's lateness in answering interrogatories, cannot and should not be attributed to the petitioners personally, since they represented exclusively the failure of petitioners' counsel, a consideration also bearing on the choice of appropriate sanction. The reasonable decision made by petitioners to retain new counsel before the expiration of the discovery period attests to their good faith attempt to comply with court orders regarding pretrial discovery.

CONCLUSION.

Petitioners herein have been denied the precious right to their day in court. The action of the District Court was taken upon a record totally devoid of evidence of willfullness and/or bad faith on the part of petitioners. Such action was further taken in the absence of any order compelling discovery. As such, it stands in contradiction to the authority of the several circuits which recognize specifically that District Judges do not have unfettered discretion in imposing Rule 37 sanctions. The constitutional limitations recognized by such courts have been disregarded by the lower Courts in this case. Justice compels that the judgment be vacated and the case remanded in order to proceed to trial.

Respectfully submitted,

ARNOLD LEVIN,
MICHAEL FISHBEIN,
JOSEPHINE B. STAMM,
ADLER, BARISH, DANIELS,
LEVIN AND CRESKOFF,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

I, Josephine B. Stamm, hereby certify that 3 copies of the foregoing Petition for Writ of Certiorari have been sent by First Class Mail to Counsel for Respondent, Jon A. Baughman, 2001 Fidelity Bldg., 123 South Broad Street, Philadelphia, Pa. 19109, on Thursday, November 29, 1979.

JOSEPHINE B. STAMM

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2564

RIVERSIDE MEMORIAL MAUSOLEUM INC. T/A DELAWARE VALLEY MEMORIAL CENTER, L. BLUMBERG'S SON, INC. and HELEN ROTHCHILD BLUMBERG,

Appellants,

v.

UMET TRUST an Unincorporated California Business Trust and SONNELBLICK-GOLDMAN CORPORATION

Sur Petition for Rehearing.

Present: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges.*°

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the deci-

° Judge Adams did not participate in the consideration of this matter.

sion having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

ALDISERT
Judge

Dated: August 31, 1979

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2564

RIVERSIDE MEMORIAL MAUSOLEUM INC. T/A DELAWARE VALLEY MEMORIAL CENTER, L. BLUMBERG'S SON, INC. and HELEN ROTHCHILD BLUMBERG,

Appellants

v.

UMET TRUST an Unincorporated California Business Trust and SONNENBLICK-GOLDMAN CORPORATION

Appeal From the United States District Court for the Eastern District of Pennsylvania
(D. C. Civil No. 75-1079)

Submitted Under Third Circuit Rule 12(6)
August 6, 1979

Before: ALDISERT, VAN DUSEN, and WEIS, *Circuit Judges.*

Judgment Order.

After consideration of all contentions raised by appellants and in light of *National Hockey League v. Metro-*

politan Hockey Club, Inc., 427 U. S. 639 (1976), and for the reasons set forth in the district court opinion by the Honorable Joseph S. Lord, III, Chief Judge, *Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp.*, No. 75-1079 (E. D. Pa. Oct. 17, 1978), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By THE COURT,

R. J. ALDISERT

Circuit Judge

THOMAS F. QUINN
Clerk

APPENDIX C.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 75-1079

RIVERSIDE MEMORIAL MAUSOLEUM INC., T/A DELAWARE VALLEY MEMORIAL CENTER, L. BLUMBERG'S SON, INC., and HELEN ROTHCHILD BLUMBERG,

v.

SONNENBLICK-GOLDMAN CORPORATION

Memorandum.

JOSEPH S. LORD, III, *Ch. J.* October 17, 1978

This case presents a picture of persistent and studied indifference by the plaintiffs to court orders and to the time requirements of the Federal Rules of Civil Procedure. The litany of defiants follows:

On October 20, 1975, *res sponte*, I ordered briefs to be filed on the question of subject matter jurisdiction. The plaintiffs' brief was due on November 4th.

November 4th came and went and no brief was filed on behalf of the plaintiffs, nor had there been any request for an extension of time.

On November 13th, nine days after the plaintiffs' brief was due, the parties filed a stipulation extending the time for filing the plaintiffs' brief to November 25, 1975.

November 25, 1975 came and went. There was no brief on behalf of the plaintiff and no request for any extension.

On December 10, 1975, five weeks after plaintiffs' brief was originally due and fifteen days after it was due under the stipulation for extension, I entered an order dismissing the action for want of prosecution.

On December 16, 1975, plaintiffs filed a motion to vacate the dismissal which was denied on January 8, 1976. Finally, however, yielding to the entreaties of plaintiffs' counsel, on March 1, 1976 I vacated the orders of December 10, 1975 and January 8, 1976 and dismissed the action on other grounds.

After the case had been twice to the Court of Appeals and back, on July 18, 1978 I entered an order directing that all discovery in this 1975 case be completed as of September 5, 1978. On July 21, 1978, fully conscious of the September 5th cut-off date, the defendant filed interrogatories to the plaintiffs. The interrogatories inquired into the entire theory and factual basis of plaintiffs' claims. The answers were during August 21, 1978.

August 21st saw the usual response from the plaintiffs —none. The answers were not filed nor was there any motion for an extension of time.

On August 24, 1978 the defendant served plaintiffs with a motion for sanctions together with a notice that the motion would be filed in this court on August 31st. The specific sanction sought and of which plaintiffs had notice was that the plaintiffs be precluded from offering any evidence as to the matters inquired into by the interrogatories.

The defendant's motion was duly filed on August 31st.[1] Plaintiffs filed a response to the motion for sanctions

1. Local Rule of Civil Procedure 36 provides for service of a copy of the motion on respondent at least five days before filing and for the respondent to reply on the date set for filing.

in which the only discernible reason given for non-compliance was that "[a]lthough the interrogatories number but eight, they are all-encompassing and the responses to the same *may be* quite voluminous." (Emphasis added). On September 1, 1978 I granted the motion for sanctions.

On September 6, 1978, after the completion date for discovery had expired, the plaintiffs filed a motion for extension of time to answer the defendant's interrogatories and on September 8, 1978, without getting permission from the court or enlargement of time for discovery, the plaintiffs filed what purported to be answers to the defendant's interrogatories. It turned out that the "voluminous" answers, filed eighteen days late and three days beyond the court-ordered discovery deadline, consisted of six pages and a host of largely irrelevant and non-responsive documents, none of which was referenced to the specific interrogatory to which it was supposed to refer. In addition, although the interrogatories sought specific dates and events, none was given. In short, the answers were both late and unsatisfactory.

On September 11, 1978 the plaintiffs filed a motion for reconsideration of my order granting the defendant's motion for sanctions and on September 13, 1978 this motion was denied.

On September 18, 1978 the following motions were filed: (1) defendant's motion for sanctions striking the plaintiffs' answers to interrogatories; (2) defendant's motion for summary judgment; (3) plaintiffs' answer to the motion for sanctions; and (4) plaintiffs' answer to the motion for summary judgment.

F. R. Civ. P. 37(d) states in pertinent part as follows:

> "If a party . . . fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories . . . the

court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule."

Rule 37(b)(2)(B) provides that the court may enter an order:

". . . refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence."

It was pursuant to this rule that I entered my order of September 1, 1978 granting the defendant's motion for sanctions.

Time limits, whether embodied in the Rules of Civil Procedure or in the order of a court, are designed to expedite the orderly movement and disposition of litigation. If those time limitations can be flouted persistently and at will, they are meaningless. Admittedly, the sanction invoked here is a stringent one and plaintiffs argue that the preclusionary order, amounting as it does to a virtual dismissal of the action, constitutes an abuse of discretion. I do not agree.

We begin with certain fundamental concepts: (1) a trial judge with an individual calendar is charged with the duty of moving his cases expeditiously; (2) to do so, he must have the power to order time limitations and to see to it that the deadlines contained in the Federal Rules of Civil Procedure are enforced; (3) he must have wide discretion to impose sanctions, without which he is helpless to enforce the exercise of his power under (2). "The conception of a court helpless to control its calendars is a hopeless one." *Gamble v. Pope & Talbot, Inc.*, 307 F. 2d 729, 735 (3d Cir. 1962). Biggs, Ch. J., dissenting.

Springing from these basics is the recognition of the inherent power of a court to invoke even the stringent sanction of dismissal for disregard of orders and rules.

In *Link v. Wabash Railroad Company*, 291 F. 2d 542 (7th Cir. 1961), *aff'd.* 370 U. S. 626 (1962), the court said at page 546:

"Courts may exercise their inherent powers and invoke dismissal as a sanction in situations involving disregard by parties of orders, rules or settings."

This "inherent power" has been incorporated into the Fed. Rules of Civ. Procedure. Rule 37(b)(2)(B), under which defendant here moved, provides for a preclusionary order. However, Rule 37(a)(2)(C) provides that for failure to answer interrogatories the court may enter an order "dismissing the action or proceeding * * *". And Rule 41(b) provides in pertinent part:

"Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

When *Link* was affirmed by the Supreme Court, *Link v. Wabash R. Co.*, 370 U. S. 626 (1962), in holding that a motion by defendant was permissive and not mandatory, the Court said at page 630:

"The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an

'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That it has long gone unquestioned is apparent not only from the many state court decisions sustaining such dismissals, but even from language in this Court's opinion in Redfield v. Ystalyfera Iron Co., 110 U. S. 174, 176, 28 L. ed. 109, 110, 3 S. Ct. 570. It also has the sanction of wide usage among the District Courts."

Thus, the power to impose a sanction which amounts to a dismissal cannot be doubted. I now examine the factors that led me to adopt this sanction, rather than a less stringent one.

First, plaintiffs were on notice that I would not let disregard of my orders go unnoticed. I had already dismissed the action once, in December, 1975, for want of prosecution, *i.e.*, failure to comply with two orders setting filing dates for briefs. Thus, it could hardly have come as a surprise to plaintiffs that the identical conduct could well result in the identical sanction.

Second, defendant's motion gave fair and explicit notice that this precise sanction of preclusion would be sought. Plaintiffs' answer to the motion was in reality no answer at all.

Third, plaintiffs' failure to answer the motion for sanctions did not stand alone as a single circumstance of dilatoriness or neglect. It was instead only one of three such omissions: the November 4, 1975 deadline for filing of briefs, the November 25, 1975 deadline for briefs, and the failure to timely answer defendant's interrogatories by August 21, 1975. "We need not decide whether unexplained absence from a pre-trial conference would *alone* justify a dismissal with prejudice if the record showed no

other evidence of dilatoriness on the part of the plaintiff. For the District Court in this case relied on *all* the circumstances that were brought to its attention, including the earlier delays." (Emphasis the Court's), *Link v. Wabash R. Co.*, 370 U. S. 626, 634 (1962).

Fourth. Strict and forceful imposition of sanctions demonstrate, not only to the immediate litigants, but to the entire Bar, that the trial judge means what he says. The result is the orderly and expeditious movement of cases to final disposition. "Public opinion, congressional declarations, court statistics, and oft repeated admonitions and suggestions of our judicial superiors have indicated the current urgency of eliminating our large backlog and preventing excessive delay by both court and counsel in the Western District of Pennsylvania. But unless appropriate sanctions are firmly imposed by the court for flagrant disobedience of its orders, the salutary purpose of [the local rule] will be entirely frustrated and the progress of litigation in this district hopelessly impeded." *Dalrymple v. Pittsburgh Consolidation Coal Company*, 24 F. R. D. 260 (W. D. Pa. 1959).

Fifth. Rule 37(d) authorizes, among others, the actions authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of the Rule. Those sanctions differ little in result among each other.[2] The net effect of each

2. Rule 37(b)(2)(A), (B) and (C):

"(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

of these is to foreclose proof by the offending party. This, of course, does not always result in dismissal or summary judgment. That, however, is the incidental effect when the matters as to which there was a failure to respond go to the party's entire claim or defense. That the interrogatories were searching and complete in no way dilutes the power of the court to choose among its options.

In *National Hockey League v. Metropolitan Hockey Club,* 427 U. S. 639 (1976), where the district court dismissed the complaint for failure to answer interrogatories, the Court said, at page 642:

> "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."

In *Anderson v. Air West, Inc.,* 542 F. 2d 522, 524 (9th Cir. 1976), "abuse of discretion" was defined in the context of an order of dismissal under Rule 41(b):

> "A rule of thumb as to the meaning of the abuse of discretion standard provides that the trial court's exercise of discretion should not be disturbed unless there is 'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.' "

In exercising my discretion to grant a preclusionary order, and ultimately summary judgment, I weighed what I considered to be the relevant factors as set forth above. If, under the circumstances of this case, my action is an abuse of discretion, then we may as well junk the Federal Rules of Civil Procedure, deprive trial judges of the power to make orders for the conduct of their calendars and leave them both toothless and caponized in frustrated impotence.

At the oral argument on defendant's motion for summary judgment, plaintiffs' counsel admitted that in reality, he was asking me again to reconsider my preclusionary order. Counsel conceded that if that order remained untouched, summary judgment for defendant was inevitable. I decline to disturb my preclusionary order, and I will therefore grant defendant's motion for summary judgment. I will also grant defendant's motion to strike plaintiffs' answers to interrogatories.

JOSEPH S. LORD, III
Joseph S. Lord, III, *Ch. J.*

Supreme Court, U. S.
FILED
DEC 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-842

RIVERSIDE MEMORIAL MAUSOLEUM, INC.
T/A DELAWARE VALLEY MEMORIAL CENTER;
L. BLUMBERG'S SON, INC.
and HELEN ROTHCHILD BLUMBERG,
Petitioner,

v.

SONNENBLICK-GOLDMAN CORPORATION,
Respondent.

RESPONDENT'S MEMORANDUM OPPOSING CERTIORARI AND OPPOSING PETITIONER'S PETITION TO CONSIDER PETITION FOR CERTIORARI AS TIMELY FILED.

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1. Respondent represents to the Court as follows:

a. The above-entitled cause, a civil case, was submitted on August 6, 1979, and judgment entered on August 7, 1979, by the United

States Court of Appeals for the Third Circuit.

b. A Petition for Rehearing was submitted by Petitioner herein on August 17, 1979, and on August 31, 1979 this Petition for Rehearing was denied by the United States Court of Appeals for the Third Circuit.

c. The Petition for a Writ of Certiorari was filed on November 30, 1979, more than ninety days since the denial of the Petition for Rehearing by the Court of Appeals. (U.S.C., Title 28, Sec. 2101(c) and Rule 22 of this Court.)

d. No application for an extension of time within which to petition for a Writ of Certiorari was submitted before the expiration of the ninety days, and the period for

applying for a Writ of Certiorari has not been extended by a Justice of this Court. (U.S.C., Title 28, Sec. 2101(c) and Rules 22 and 34(2) of this Court.)

e. The cases cited by Petitioner in its Petition to Consider Petition for Certiorari as Timely Filed are inapposite. Both of those cases were criminal cases, in which the ninety day time limitation was imposed solely by Rule 22(1) of this Court, and not by jurisdictional statute. See, Heflin v. United States, 358 U.S. 415, 418 n.7 (1959). Durham v. United States, 401 U.S. 481 (1971), and Taglianetti v. United States, 394 U.S. 316, 317 n.1 (1969), cited by Petitioner, stand for the proposition that timeliness under this Court's rules presents no jur-

isdictional question. The above-entitled cause is a civil case, as to which the time limitations are imposed by U.S.C., Title 28, Sec. 2101(c), and implemented by this Court's rules.

f. THEREFORE, it appears that Petitioner' application for a Writ of Certiorari is out of time and "must . . . be denied for want of jurisdiction," Department of Banking v. Pink, 317 U.S. 264, 268 (1942).[1]

1. No exceptions to or waivers of the time requirement imposed by U.S.C., Title 28, Sec. 2101(c) are recognized, no matter how extenuating the circumstances. See, e.g., Deal v. Cincinnati Board of Education, 402 U.S. 962 (1971) (airline lost all the papers); Teague v. Commissioner of Customs, 394 U.S. 977 (1968) (unforeeable snowstorm created postal delay). In addition, no such extenuating circumstances are present in this case.

2. Respondent further represents to the Court as follows:

a. The above-entitled cause clearly does not warrant review by this Court, as is shown by the opinions below (reprinted as Appendices B and C to Petition for Writ of Certiorari).

b. This case concerns the imposition of sanctions pursuant to F.R.C.P. 37, not for a late filing of Answers to Interrogatories as alleged by Petitioner, but rather for a total failure to file such Answers, preceded by other instances of disregard of court orders and time requirements. Petitioner's Answers to Respondent's Interrogatories were due on August 21, 1978. No answers were filed. On August 24, 1978, Respondent served Petitioner with a Motion for Sanc-

tions (specifying the sanction eventually imposed), with a notice that the motion would be filed in the District Court on August 31, 1978.[2] Petitioner filed a response to the Motion for Sanctions. On September 1, 1978, no answers to interrogatories having been filed by Petitioner, the District Court granted the Motion for Sanctions. Thereafter, Petitioner attempted to file answers to the interrogatories (which answers were found by Judge Lord to be totally inadequate). See, Opinion of Judge Lord, Appendix C to Petition for Certiorari, at pp. A6-A7.

2. Local Rule of Civil Procedure 36 provides for service of a copy of the motion on respondent at least five days before filing and for the respondent to reply on the date set for filing.

c. Petitioner's entire course of conduct in this case is evidence of Petitioner's bad faith. See Opinion of Judge Lord, Appendix C to Petition for Certiorari, at A5-A13, and additional items appearing of record which are catalogued in Brief for Appellee in the Court of Appeals (Respondent herein), and citations to the Record therein.

d. Petitioner had ample notice of the importance of compliance with court orders and time requirements in this case. In addition to the fact that the District Court previously had dismissed this action for want of prosecution, the District Court's order that discovery be completed by September 5, 1978 was quite explicit, stating in part that:

> "(1) All discovery and pre-trial proceedings shall be completed before September 5, 1978, and the case shall be subject to call for trial at any time thereafter.
> (2) Counsel shall take whatever steps are necessary to insure compliance with the time limitation set in paragraph (1) hereof.
> (3) If opposing counsel's lack of response or lack of compliance with discovery makes it appear likely that the deadline may pass without completion of discovery, counsel is expected to invoke the procedures established by the Federal Rules of Civil Procedure and the Local Rules of this court to compel compliance.
> (4) Failure of counsel to utilize such procedures to insure compliance of the discovery deadline shall not be a ground for enlargement of discovery time or postponement of trial."

Order of Judge Lord (July 14, 1978), reprinted at pp. 51a-52a of Appendix to the Briefs of Appellant in the Court of Appeals (Petitioner herein).

e. Petitioner states that a one and one-half month period was inadequate for discovery in this case, thereby implying that no more time had been available. However, Petitioner could have engaged in discovery during the eight month period between the filing of the Complaint on April 14, 1975 and the first dismissal of this action on December 10, 1975, but failed to do so.

d. THEREFORE, the Petition for a Writ of Certiorari, and the Petition to Consider Petition for Certiorari as Timely Filed, should be denied.

Respectfully submitted,

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